BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

94-123

In re	)
	)
Constitutionality of	)
Section 73.658(k)	)
of the Commission's Rules	)
("Prime Time Access Rule")	)

To: The Commission

PETITION FOR DECLARATORY RULING

FIRST MEDIA CORPORATION

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SUMMARY

First Media Corporation, the licensee of WCPX-TV, Orlando, Florida, asks the Commission to announce by declaratory ruling that the Prime Time Access Rule will no longer be enforced because it can no longer be reconciled with the First Amendment.

The rule, adopted in 1970, prohibits network affiliate television stations in the top 50 markets from broadcasting certain categories of programs during part of prime time. This restriction upon licensees' freedom to choose what they will broadcast has survived constitutional challenge in the past on the ground that spectrum scarcity has justified government regulation of broadcast program content. In 1987, however, the Commission rejected that rationale when it rescinded the Fairness Doctrine, finding that spectrum scarcity has been eliminated by dramatic technological advances since the 1970's.

In light of that finding, and especially given the near universal availability today of cable television with its vast video channel capacity, there remains no First Amendment justification for restraining the programming discretion of television broadcasters. In short, the Prime Time Access Rule, like the Fairness Doctrine, is no longer a constitutionally permissible exercise of the Commission's power to regulate broadcasting. A declaratory ruling to that effect is warranted.

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PETITION FOR DECLARATORY RULING

First Media Corporation ("First Media") files this petition pursuant to Section 1.2 of the Commission's Rules to request a declaratory ruling that Section 73.658(k) of the Rules, known as the Prime Time Access Rule ("PTAR"), is no longer a constitutionally permissible exercise of the Commission's power to regulate broadcasting.[1/]

A. Standing

1. First Media is the licensee of Television Station WCPX-TV, Channel 6, Orlando, Florida, a CBS network affiliate. As a network affiliate station in one of the top 50

1/ This petition is directed to the Commission rather than to the staff, because petitions for declaratory ruling containing new arguments not previously considered by the Commission are addressed by the Commission en banc. 47 C.F.R. §0.283(b)(5).

television markets, WCPX-TV is subject to the broadcast-content restrictions imposed by the Prime Time Access Rule.[2/] WCPX-TV currently wishes (and has the contract rights) to broadcast certain off-network programs during the hour of 7:00 p.m. to 8:00 p.m. that the Prime Time Access Rule bars the station from broadcasting. It is First Media's judgment that these programs are of greater appeal to the public in the WCPX-TV service area than the programs the station is now able to carry during the broadcast hour in question.[3/] If freed from the mandate of PTAR, WCPX-TV would promptly revise its programming schedule accordingly.

B. Need for a Declaratory Ruling

2. The Prime Time Access Rule directly prohibits affiliates of ABC, CBS, and NBC (and perhaps soon Fox) in the 50 largest television markets from transmitting certain categories of programs during part of the prime time viewing period.[4/]

2/ Orlando is located in the Orlando-Daytona Beach-Melbourne market, which the Commission has designated one of the top 50 markets for the purpose of Section 73.658(k) during the period September 1989 to September 1995. Public Notice, Mimeo No. 2843, April 17, 1987; Public Notice, Mimeo No. 2720, April 16, 1990.

3/ As the Commission acknowledged not long after it adopted PTAR, the diversity of programming available for broadcast during the access hour is somewhat limited. In the Commission's words, "the emphasis is on game shows." Second Report and Order, 50 FCC 2d 829, 837 (1975).

4/ Prime time is defined as 7:00-11:00 p.m. in the Eastern and Pacific time zones and 6:00-10:00 p.m. in the Central and Mountain time zones. 47 C.F.R. §73.658(k).

Specifically, these stations are barred from filling more than three of the four prime time hours with network programs (i.e., programs provided by the network) or off-network programs (i.e., programs formerly on a national network). While exception is made for some favored kinds of network or off-network programs -- namely news, public affairs, documentary, political, children's, certain live sports, and feature film programs -- the rule applies to all other forms of network and off-network programming. As a result, broadcasters subject to the rule suffer a very substantial restriction upon their programming discretion during the heaviest viewing hours of the broadcast day.[5/]

3. This restraint on broadcasters' freedom to choose what they broadcast has survived constitutional challenge in years past. However, since the last time the issue was addressed, the constitutional framework has been dramatically altered. In its seminal 1987 Syracuse Peace Council decision rescinding the Fairness Doctrine, the Commission rejected as no longer valid the only basis on which broadcast content

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5/ 52.9% of TV households have TV sets in use from 8:00-11:00 p.m. (all nights), as compared to 25.6% during the 10:00 a.m.-1:00 p.m. daypart (M-F) and 30.5% during the 1:00-4:30 p.m. daypart (M-F). Source: Broadcasting Yearbook 1990, p. G-16 (citing National Audience Demographics Report, August 1989). In the Orlando-Daytona Beach-Melbourne market, 63% of TV households have sets in use from 7:00-8:00 p.m. (M-F), and 62% have sets in use from 8:00-11:00 p.m. (M-F). Source: Nielsen, February 1990.

regulation has ever been reconciled with the First Amendment -- spectrum scarcity.[6/] In so doing, the Commission asserted its view that broadcasters should now have the same First Amendment protections that apply to the print media.

4. The compelling logic of the Syracuse decision, we believe, leaves the Prime Time Access Rule (like the Fairness Doctrine) without further constitutional justification. At best, the continued validity of PTAR is highly uncertain under the Commission's current constitutional analysis. A declaratory ruling is warranted in these circumstances, for "removing uncertainty" is one express purpose of declaratory rulings. 47 C.F.R. §1.2. Such a ruling is especially appropriate to resolve what the Commission itself recognizes is a serious issue of constitutional magnitude. As set forth below, therefore, we ask the Commission to declare that the Prime Time Access Rule contravenes the First Amendment rights of broadcasters and will no longer be enforced.

C. The History of PTAR

5. The Commission adopted the Prime Time Access Rule twenty years ago to restrain domination of evening television by the three national networks (ABC, CBS, and NBC)

6/ Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), affirmed sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 107 L Ed 2d 737 (1990).

and give independent producers access to evening viewing hours. Report and Order, 23 FCC 2d 382, 384 (1970). This action was prompted by the following "relatively simple" facts: (1) there were only three national television networks; (2) in the top 50 markets there were 224 operating television stations, of which 153 were network affiliates; (3) only 14 of the top 50 markets had at least one independent VHF television station; and (4) control over programming and over access to licensed stations was heavily concentrated in the hands of the three networks. Id. at 385-86. The Commission found that these circumstances combined to stifle independent producers and thereby limit the diversity of programming available to the public. Independent producers, said the Commission, "must have an adequate base of television stations to use [their] product," and access to the top 50 markets "is essential to form such a base." Id. at 386. To open adequate outlets for independently-produced programming, the Commission curtailed the amount of prime time that the network affiliate stations could fill with network-produced programming. "Our objective is to provide opportunity -- now lacking in television -- for the competitive development of alternate sources of television programs...." Id. at 397.

6. The Prime Time Access Rule, therefore, was spawned by a dearth of television stations available to transmit non-network programming to the public. And the constitutional justification of the rule was founded on the same premise. When

PTAR was challenged as a direct restraint on speech in contravention of the First Amendment, the Second Circuit upheld the rule on the ground that spectrum scarcity justified restrictions on broadcast content. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971), citing Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969). Articulating the scarcity rationale in Red Lion, the Supreme Court had stated: "Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." 395 U.S. at 390. The Court characterized this as "enforced sharing of a scarce resource." Id. at 391.

7. The Commission itself embraced that rationale four years later when opponents of PTAR renewed their constitutional objections before the agency. Acknowledging that PTAR was a "restraint on licensees," the Commission declared that "the inherent limitations in broadcast spectrum space make necessary restraints -- restricting the speech of some so that others may speak -- not elsewhere appropriate." Second Report and Order, supra, 50 FCC 2d at 847. In the fifteen years that have passed since that pronouncement, neither the Commission nor the courts have revisited PTAR.

D. The Scarcity Rationale Is No Longer Valid

8. Recently, however, the Commission has thoroughly reevaluated and rejected the rationale of spectrum scarcity, on which the constitutionality of PTAR was solely premised. Syracuse Peace Council, supra. Noting "the extraordinary technological advances that have been made in the electronic media since the 1969 Red Lion decision," the Commission urged that the Red Lion premise be reassessed. 2 FCC Rcd at 5048. With respect to video programming services, the Commission found that since Red Lion was decided in 1969: the number of television stations overall in the country had increased by 57%; the number of UHF stations had increased by 113%; the number of television households receiving five or more over-the-air television signals had increased from 59% (in 1964) to 96%; the number of cable television systems had increased (since 1974) by 111%; the number of cable television subscribers had increased (since 1974) by 345%; the percentage of cable systems able to carry more than 12 channels had increased from 1% to 69% (serving 92% of cable subscribers); the percentage of television households with access to cable had risen to 75%; the number of households actually subscribing to cable (43,000,000) had risen by 47%; and significant contributions to programming diversity were now being made by new electronic technologies that had been unavailable at the time of Red Lion, including low power

television, MMDS, video cassette recorders (VCRs), and satellite master antenna systems (SMATV). Id. at 5053. The Commission concluded that these "dramatic changes in the electronic media" have rendered obsolete "First Amendment principles that were developed for another market." Id. at 5054. In short, said the Commission, the concept of scarcity is now "irrelevant" in analyzing the appropriate First Amendment standard to be applied to the electronic media. Id. at 5055.[7]

9. Today, almost three years after the Commission rejected the scarcity rationale in Syracuse, the facts are even more compelling. There is now a plethora of channels available to program producers for the transmission of video programming to the public:

- There are 1,449 licensed television stations in the United States;[8]

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[7] The courts have not yet spoken on this conclusion of law. Although the Court of Appeals affirmed Syracuse, it did so without reaching the Commission's constitutional holding. Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989), cert. denied, 107 L Ed 2d 737 (1990). In 1984, three years before Syracuse, the Supreme Court indicated a willingness to revisit the scarcity rationale upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, 376, n. 11 (1984).

[8] Source: FCC Public Notice, Mimeo No. 2519, April 3, 1990.

• In the top 50 markets, there are 418 commercial television stations, an average of 8.4 per market;[9/]

• Approximately 2,500,000 residential households in the United States have home satellite dishes for direct reception of programming via satellite;[10/]

• 77.6% of all households, and 78.9% of TV households, in the United States have access to cable television;[11/]

• 53,200,000 households, constituting 57.8% of TV households in the United States, subscribe to cable television;[12/]

• 20.6% of cable subscribers receive 54 channels or more, 66.2% receive 30-53 channels, and 8.8%

9/ Source: Television & Cable Factbook, Stations Volume No. 58, 1990 Ed., pp. A-1 - A-2 (for top 50 markets specified by FCC Public Notice, Mimeo No. 2843, April 17, 1987).

10/ Source: Notice of Inquiry in the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, FCC 89-345, released December 29, 1989, ¶54.

11/ Source: Television & Cable Factbook, Cable & Services Volume No. 57, 1989 Ed., pp. C-331 (Arbitron data), C-376.

12/ Source: A.C. Nielsen Co. data, cited in Communications Daily, March 15, 1990, p. 7.

receive 20-29 channels, making a total of 95.6% who receive 20 channels or more;[13/]

• The basic cable networks now have a higher combined rating, as measured both for all TV households (6.4) and for cable households (10.5), than do NBC affiliates (6.1/5.7), CBS affiliates (6.0/5.4), ABC affiliates (5.8/5.4), or independents (6.0/5.0);[14/]

• A great variety of program services are now received by 20 million or more households, as reflected by the following subscriber data for basic cable networks (predominant format in parentheses):[15/]

Program Service	Subscriber Households
ESPN (sports)	55,300,000
CNN (news, public affairs)	54,000,000
TBS (movies, sports)	52,600,000
USA Network (movies, sports)	51,500,000
Nickelodeon (entertainment)	50,000,000
MTV (music video)	49,700,000
Family Channel (variety)	48,600,000

13/ Source: Cable & Television Factbook, Cable & Services Volume No. 57, 1989 Ed., p. C-375.

14/ Source: A.C. Nielsen Co. data, cited in Multichannel News, March 12, 1990, pp. 1, 48 (data for January 1990).

15/ Source: Multichannel News, March 19, 1990, p. 21.

C-Span (public affairs)	48,600,000
Discovery Channel (informational)	48,200,000
Lifetime (informational)	46,000,000
Arts & Entertainment (movies)	43,000,000
Weather Channel (weather)	42,400,000
Headline News (news)	40,900,000
TNT (entertainment, sports)	37,900,000
Video Hits-1 (music video)	35,000,000
FNN (financial news and discussion)	32,600,000
WGN-TV (movies, sports)	30,000,000
BET (Black-oriented entertainment)	25,500,000
CVN (home shopping)	23,400,000
C-SPAN II (public affairs)	20,000,000

10. As these data demonstrate, the enormous growth of cable television alone has turned spectrum scarcity into channel abundance. The great majority of the American public now has access to cable television, which means instant access not to four or five channels (as in the Red Lion era) but to upwards of fifty channels. Likewise, there are now upwards of fifty, not merely four or five, outlets available for producers of video programming who wish to disseminate programs to the public. To the viewer in his living room, there is no functional difference between transmission over-the-air and transmission by wire cable. Both modes of transmission bring video programs to his screen. The Commission is correct,

therefore, to aggregate broadcast channels and cable channels when assessing the diversity of program sources available to the public, as it did when it reexamined the notion of spectrum scarcity in Syracuse.

11. Aggregation of functionally indistinguishable broadcast channels and cable channels produces a far different constitutional analysis from that articulated in Red Lion. The courts have already held that the scarcity rationale cannot sustain regulation of cable television because cable channel capacity is virtually unlimited. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448-51 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-45 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). If there is no scarcity of channels when only the cable component is considered, there plainly is no scarcity when both the cable and the broadcast components are considered.

12. To be sure, broadcast and cable have heretofore been subjected to different First Amendment standards because broadcast channels are scarce and cable channels are not. However, that distinction is no longer viable if cable channels are deemed equivalent to broadcast channels as sources of video diversity. It is well within the Commission's province and expertise as a regulatory agency to determine that cable channels and broadcast channels are equivalent in that respect, and the Commission so determined in Syracuse. Thus, the

Commission has already made the finding that bridges the constitutional gap which once separated broadcasting from cable.

E. PTAR Is an Unconstitutional Abridgement of Broadcasters' Right of Free Speech

13. If PTAR can no longer be justified under a special First Amendment standard for broadcasting because the scarcity rationale no longer applies, it must be judged by First Amendment standards of general applicability. The applicable standards are those recited in Quincy Cable TV, Inc. v. FCC, supra: a regulation restricting speech, even if not designed to suppress or protect a particular viewpoint, will be sustained only if it furthers an important or substantial governmental interest and imposes only an incidental burden on speech. Id., 768 F.2d at 1450-51. See also, Home Box Office, Inc. v. FCC, supra, 567 F.2d at 48.

14. PTAR does not operate to suppress or protect any particular viewpoint. However, it is explicitly designed to favor one class of speakers over another. In the favored class are independent producers; in the disfavored class are the national networks (ABC, CBS, NBC, and perhaps soon Fox) and the network affiliate stations in the top 50 markets. In order to create access for independent producers during the specified time period, the rule denies access to the networks and circumscribes the affiliates' freedom as licensees to choose what they will broadcast in the exercise of their public

interest judgment. Without deciding the question, the Court of Appeals in Quincy voiced grave doubt that this kind of access regulation represents merely an incidental burden on First Amendment rights. 768 F.2d at 1453.[16/] PTAR imposes two burdens that are far from incidental and far from insignificant: (1) it directly and deliberately precludes networks from airing certain programs in the major markets during peak viewing hours; and (2) it directly and deliberately forces affiliate stations in those markets to broadcast programs they might otherwise choose not to broadcast. In both purpose and effect these are far more than mere "incidental" burdens on the First Amendment rights of those so burdened. For this reason, PTAR cannot be sustained.

15. PTAR is also unconstitutional because it imposes a time restriction that turns on program content. A regulation governing the time, place, or manner of speech may not be based on the content or subject matter of speech. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984); Consolidated Edison v. Public Service Commission, 447 U.S. 530, 536 (1980). PTAR violates this precept by exempting programs of a certain subject matter

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16/ The must-carry rule at issue in Quincy required cable television systems to carry the signals of the local broadcast stations in their areas. The rule thereby favored local broadcasters over other would-be cable programmers and severely impinged on the editorial discretion of cable operators. The Court struck down the rule on the ground that the Commission had not proven the existence of the threat on which the rule was premised, i.e., that the growth of cable would undermine the economic vitality of local broadcasting.

from the prime time restriction. Exempted are news, public affairs, documentary, children's, live sports, and feature film programs. All other programs are restricted. Thus, licensees may broadcast favored programs throughout prime time but non-favored programs during only a portion of prime time -- the distinction depending solely on the content of the program. In short, PTAR imposes its own value judgments in limiting the freedom of licensees to choose what they will broadcast. This is clearly impermissible. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., supra, at 648-49.

F. Conclusion

16. The Commission recognized in Syracuse that a dramatically altered communications landscape calls for reexamination of the constitutional framework of broadcast regulation. The abundance of video channel outlets now available nullifies the scarcity rationale as a justification for continued regulation of broadcast program content. If the Fairness Doctrine is no longer constitutionally enforceable, neither is the Prime Time Access Rule. Continued enforcement of PTAR, we believe, is fundamentally at odds with the legal principles announced in Syracuse. If the Commission agrees with this view, it should promptly suspend enforcement of PTAR. If it disagrees, it should resolve the constitutional uncertainty

that Syracuse plainly creates for PTAR. In either case, a declaratory ruling is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joan Trepal, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., do hereby certify that copies of the foregoing "Petition for Declaratory Ruling" have been hand delivered this 18th day of April, 1990, to the following:

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